Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149
	)	

COMMENTS OF VERIZON ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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COMMENTS OF VERIZON ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING[1]

I. Introduction and Summary

As the Tenth Circuit's decision establishes, the only policy Commission can lawfully adopt here for obtaining customer permission for use of CPNI within a company is "opt-out."[2] Not only is adopting opt-out the only approach that is consistent with the Constitutional requirement, it is also good public policy. It is consistent with customers' one-stop shopping desires and expectations and allows a firm to market on a targeted basis, while ensuring that the

[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc. listed in Attachment A.

[2] The term "opt-out" is used here to refer to the right of a customer, after receiving notice from the carrier, to choose not to allow that carrier and its affiliates to use CPNI to sell or market certain products and services. By contrast, under "opt-in," the customer must give affirmative approval before the carrier may use CPNI to market and sell products and services outside of the customer's total service.

competitive policies established in other provisions of the 1996 Act are fully protected. Indeed, when the Commission adopted opt-out in the mid-1980s in connection with enhanced services and CPE there were no complaints, and competition for CPE and enhanced services flourished during more than a decade in which opt-out was in place. And, as the Commission has correctly found on three separate occasions, there is no basis under the Act for applying a different rule to the Bell operating companies or their long distance affiliates than to their competitors. Finally, there is no basis for the Commission to restrict information flow within an enterprise by abandoning the total service approach adopted in earlier orders.

II. Opt-Out Is Required By Law.

The Tenth Circuit found conclusively that a firm's ability to market its own products and services to a targeted audience constitutes protected commercial speech. *U.S. WEST, Inc., v. FCC*, 182 F.3d 1224, 1233 (10th Cir., 1999) ("*U.S. WEST*") ("the targeted speech in this case fits soundly within the definition of commercial speech"). After examining the government's interest, as expressed in section 222 of the Act, in protecting customer privacy, it concluded that the opt-in requirement was not narrowly tailored to protect that interest. Accordingly, it found "that the CPNI regulations interpreting the customer approval requirement of 47 U.S.C. э 222(c) violate the First Amendment." *Id*. at 1239.

The court noted that the Commission itself had found that sharing of customer information within a single firm "does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive increased competitive offerings." *Id*. at 1237, quoting the Commission's *Second Report and*

Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, & 55, n.203 (1998) ("CPNI Order").[3]

The court's finding (that within a single company an opt-in policy is unnecessary to protect a customer's privacy) is consistent with earlier policy determinations in analogous situations. For example, in allowing telemarketing unless a customer opts out (by asking to be placed on a "do not call" list) Congress and the Commission concluded that a customer expects that a company with which he or she has a prior business relationship, along with that company's affiliates and subsidiaries, will have the opportunity to market all of its products and services to that customer, and that such marketing does not violate the customer's privacy expectations. *See* 47 U.S.C. ə 227(a)(3)(B); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, & 34 (1992). In addition, the requirements governing the use of CPNI by cable companies have historically reflected this same policy determination. *See* 47 U.S.C. ə 551. Given that cable companies compete directly with telephone companies in providing many services, if opt-in is unnecessary to protect customer privacy for cable companies, then an attempt to apply that policy to telephone companies cannot be justified as a narrowly tailored remedy to protect the governmental interest in protecting customer privacy. Similarly, when it adopted non-structural safeguards governing provision of customer premises equipment ("CPE") and enhanced (now information) services by the former Bell operating companies and AT&T, the Commission employed an opt-out CPNI regime for nearly all

[3] That finding was based on a substantial and complete record showing customer needs and expectations, as discussed in section III below.

customers.[4] Therefore, the court's finding that opt-in is not a properly-tailored remedy to protection of privacy is consistent with the Commission's own prior policies.

III. Opt-Out Is Consistent With Customer Expectations and Is Good Public Policy.

Each time the Commission has examined its CPNI policy, the record has shown conclusively that the overwhelming majority of the public – both consumers and business customers – expect that a single firm will be able to use information on a customer's product and service purchases from that company to offer complementary products and services, and that they want that result. This extensive record from past proceedings is echoed in testimony by noted privacy experts presented just this year in Congressional hearings on the public's privacy expectations.

Indeed, the various studies that previously have been provided to the Commission consistently reflect that expectation. For example, a survey submitted by what was then Bell Atlantic showed that customers were angered and confused when they had to authorize access to CPNI before a single sales person could offer them a full range of the company's services and products. Instead, they wanted the ability to obtain one-stop shopping and expected to be able to obtain information about all Bell Atlantic products from the same person.[5] Small business

[4] *See e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase I Report and Order*, 104 F.C.C.2d 958 at && 264-65 (1986); *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order*, 2 FCC Rcd 143, & 70 (1987); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571, && 84-89 (1991) ("*Computer III Remand Order*"). Only business customers with more than 20 lines were required to give prior consent before enhanced services marketing personnel could access CPNI regard their products and services. *See Computer III Remand Order* at & 86.

[5] *See* Supplemental Comments of Bell Atlantic, CC Docket No. 90-623 at Att. 2 (filed May 5, 1994).

customers that called Bell Atlantic's Business Offices told sales personnel that Bell Atlantic "should look for ways to improve my services to my customers with [a full range of] telecommunications products" and that "[m]arketing reps. should tailor the products/services they offer for the customer's needs." They indicated that they "want the vendor to put a complete package together." *Id*.

Other studies confirm that survey. For example, a study conducted by Louis Harris and Associates and Dr. Alan Westin showed that 63% of the public had no problem with subsidiaries within the same corporate family sharing customer information in order to offer their services or products. *See id*. at Att. 1. Another study found that nearly 86% of small businesses preferred to deal with a single company (together with affiliates) for all services and products.[6] Still another reported that two-thirds of consumers wanted to be offered "bundled" services (i.e., one-stop shopping), while 95% of residential customers preferred having at least two categories of telecommunications and related services offered together on a bundled basis.[7]

Just this year, privacy experts testifying before Congress reiterated these the same public expectations. Dr. Alan Westin, Professor Emeritus at Columbia University and President, Privacy and American Business, testified that "more than three out of four [consumers] consider it acceptable that businesses compile profiles of their interests and communicate offers to them," so long as they are given notice and an opportunity to choose not to allow use of their

[6] NFIB Foundation, "Who Will Connect Small Businesses to the Information Superhighway?" at 22 (Dec. 1994), cited in Comments of Bell Atlantic in CC Docket No. 96-115 at 6-7 (filed June 11, 1996) ("1996 Comments").

[7] IDC/LINK, Telecommunications Brand Equity Study at 1 (1996), cited in 1996 Comments at 7. *See also*, Reply Comments of Bell Atlantic in CC Docket No. 96-15 at 4-5 (filed June 26, 1996).

information in this way, *i.e.*, to opt-out.[8] Similarly, Prof. Fred H. Cate of Indiana University School of Law, testified that the sharing of information within a company "enhance[s] customer convenience and service." It allows a customer to call one customer service number and deal with various affiliates of a single company "as if they were one." Moreover, Prof. Cate pointed out that such information-sharing "also allows consumers to be informed rapidly and at low cost of those opportunities in which they are most likely to be interested."[9]

Use of CPNI within a single company allows the company to target-market to those customers who, by their prior purchases, are more likely to be interested in a particular product or service. Without targeted solicitations, consumers would receive "more unsolicited mail, e-mail, and telephone calls," because businesses could not market services and products only to those who are likely to be interested. *Id*. Prof. Paul Rubin of Emory University echoed that view, testifying that consumers benefit from receiving targeted advertising, because it "reduces the likelihood that consumers will be bothered with information that is of no interest to them."[10]

Finally, as cited above, the Commission itself used opt-out as its principal CPNI policy for well over a decade before the current CPNI rules were adopted, without complaint or competitive impact. Under Computer Inquiry II and III, the former Bell operating companies and (for a time) AT&T were permitted to use CPNI to market CPE and enhanced services to all but their very largest customers after giving customers notice and an opportunity to opt out of

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[8] "What Consumers Have to Say About Information Privacy," prepared statement of Dr. Alan Westin before the House Subcommittee on Commerce, Trade, and Consumer Protection, Mach 8, 2001.

[9] "Privacy in the Commercial World," prepared statement of Fred H. Cate, before the House Subcommittee on Commerce, Trade, and Consumer Protection, March 1, 2001.

[10] "Privacy in the Commercial World," prepared statement of Paul Rubin, before the House Subcommittee on Commerce, Trade, and Consumer Protection, May 1, 2001.

such use. During that period, not only were there no complaints that privacy was being undermined or customers' wishes not followed, but the CPE and enhanced services markets thrived.[11]

There is, therefore, an unbroken record, developed in each phase of this proceeding since 1994 and supported by privacy experts today, and consistent with the Commission's own previous policies, that the public is best served by allowing a company to use information about a customer's prior purchases of goods and services to target-market additional services and products to that customer. Of course, by adopting notice and opt-out, the Commission will also enable those customers who affirmatively choose to have that information withheld to prevent its use for marketing other categories of products and services. In that way, the majority who expect a single company to use information for target marketing can receive the benefits of that marketing, while those who choose otherwise will have their desires honored.

IV. There Is No Basis For the Commission To Change Its Findings On the Relationship of Sections 222 and 272.

There is no basis for the Commission to revisit the conclusion that it has reached twice before, that section 222 governs the use of CPNI among all affiliates of all carriers, including the former Bell operating companies, and that it is not in some way "trumped" by the provisions of section 272, which governs the relationship between a former Bell company and its separate affiliate offering long distance service.

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[11] Section 222 of the Act is principally a privacy provision. *U.S. WEST*, 182 F.3d at 1236 ("Congress did not intend for competition to be a significant purpose of ə 222…. [T]he plain language of the section deals almost exclusively with privacy"). However, the Commission can use its experience with opt-out in the CPE and enhanced services world to find that its use will not harm competition.

As the Tenth Circuit pointed out, section 222 was enacted principally to protect customer privacy, not to further competition. *U.S. WEST*, 182 F.3d at 1236 ("We are not satisfied that the interest in promoting competition was a significant consideration in the enactment of ə 222"). By contrast, section 272 requires the former Bell operating companies to provide certain competitive activities through separate affiliates for a period of time and specifies the relationship between the former Bell operating companies and those affiliates.

Given the different purposes of the two provisions, the Commission has properly found on three separate occasions that,

> section 272 … impose[s] no additional obligations on the BOCs when they share CPNI with their statutory affiliates according to the requirements of section 222…. This is so because imposing section 272's nondiscrimination obligations when the BOCs share CPNI with their section 272 affiliates would not further the principles of customer convenience and control embodied in section 222, and could potentially undermine customers' privacy interests as well.

CPNI Order at & 160. Therefore, it found that the term "information" as used in the nondiscrimination provision, section 272(c)(1) does not include CPNI. *Id*. at && 154, 158. It concluded that the sharing of information contemplated by section 222 "would be severely constrained or even negated by the application of the section 272 nondiscrimination requirements." *Id*. at & 158.

On reconsideration, the Commission affirmed its earlier decision, finding that "section 222's specific definition of CPNI is meant to govern the more general use of the term 'information' in section 272(c)(1)." Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, & 141 (1999) ("Recon. Order"). It concluded that "section 222 contemplates a sharing of CPNI among all affiliates (whether BOCs or others), consistent with customer

expectations that related entities will share information so as to offer services best tailored to customers' needs." *Id*. at & 142.

The Commission reiterated these same findings after the Tenth Circuit's vacatur, concluding again that "section 272(c)'s reference to 'information' does not include CPNI." *AT&T Corp. v. New York Telephone Company*, 15 FCC Rcd 19997, & 16 (2000). There, the Commission denied a complaint that Verizon-New York had violated section 272 of the Act in the conduct of inbound telemarketing of the services of its long distance affiliate. AT&T had claimed that Verizon-New York had used the identity of the customer's presubscribed interexchange carrier ("PIC") without making that identity available to other long distance companies for marketing purposes. The Commission held that the identity of the PIC was CPNI, and that access to CPNI is governed by the requirements of section 222, not the nondiscrimination provisions of section 272.

These findings constitute statutory interpretations, not policy statements. As such, they remain undisturbed by the Tenth Circuit's vacatur of the opt-in rule. Indeed, the court's determination that a requirement for prior authorization before an affiliate may use CPNI is a Constitutional violation provides even greater support for the Commission's interpretation.[12] Imposing a prior restraint on use by the long distance affiliate of CPNI relating to the customer's local or wireless services would likewise be unconstitutional. If the nondiscrimination

[12] There can be no question that the court's holding applies to communications between the carrier and its affiliates. In defining "commercial speech" that is subject to First Amendment protection, the court found that,

> in this case, when the sole purpose of the intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation. Therefore, the speech is properly categorized as commercial speech.

U.S. WEST, 182 F.3d at 1233, n.4.

requirement of section 272(c)(1) were applied here, and CPNI were shared with the affiliate without affirmative customer authorization, the CPNI would also need to be shared with non-affiliated long distance companies without prior authorization. But section 222 prohibits such disclosure to third parties except upon "affirmative written request by the customer." 47 U.S.C. ∋ 222(c)(2). Therefore, applying the nondiscrimination provision of section 272 would either prevent the carrier from disclosing the CPNI to the affiliate without prior customer consent, in contravention of its First Amendment rights, or force the carrier to disclose it to third parties without customer consent, in contravention of section 222(c)(2).

In addition, as the Commission found, in section 222, "Congress carved out very specific restrictions governing customer privacy." Recon. Order at & 142. Those specific restrictions, it found, take precedence over more general provisions, such as the general nondiscrimination provision for sharing of "information" in section 272(c)(1), when the two conflict. *Id*. Because, as a practical matter, application of the nondiscrimination provision of section 272(c)(1) to CPNI "would bar BOCs from sharing CPNI with their affiliates," in contravention of section 222, the Commission found there to be a conflict and properly concluded that CPNI is not subject to section 272(c)(1). *Id*.

This is also the only finding that is consistent with section 272, notwithstanding the requirements of section 222. In establishing the relationship between the Bell operating telephone company and its separate affiliate, Congress expressly allowed the telephone company, the separate affiliate, or both to market and sell a combination of local and long distance service. *See* 47 U.S.C. ∋∋ 272(g)(1) and (2). And that right to joint market expressly overrides the nondiscrimination requirements of section 272(c). *See* 47 U.S.C. ∋ 272(g)(3). Joint marketing inherently carries with it access by the marketing entity to CPNI. A customer

cannot obtain one-stop shopping if the marketing arm cannot ascertain what services the customer already has, nor can the joint sales and marketing personnel even advise on complementary products without knowledge of the customer's existing service. Without such access, the express permission to engage in joint marketing will prove illusory. Therefore, access to CPNI, which is part and parcel of joint marketing, is not subject to section 272(c)(1).

As a result, the only conclusion the Commission can adopt that is consistent with *either* section 222 or 272 is to reaffirm that the Bell company may share CPNI with its section 272 affiliate, subject to the notice and opt-out requirement which the Tenth Circuit found is the most the Commission can require.

Likewise, there is also no valid policy reason for applying a more stringent CPNI rule on the former Bell companies' relationship with their long distance affiliates than it applies to their local competitors' relationship with their long distance operations. The Commission has found that the Bell companies' long distance affiliates should be treated as non-dominant, because they will "not have the ability to raise price[s] by restricting their output upon entry or soon thereafter." *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, & 96 (1997). They are entering the market with a "zero market share," *id*., and will be competing against a series of "large well established carriers." *Id*. at & 97. As a result, the Commission found "that the cost structure, size and resources of the BOC interLATA affiliates are not likely to enable them to raise prices above the competitive level for their domestic interLATA services." *Id*.

Under these circumstances, there is no policy reason for the Commission to adopt a more stringent CPNI requirement on the long distance affiliates than it had adopted as a nonstructural safeguard for the Bell companies' provision of CPE and enhanced services in the mid-1980s.

There, the Bell companies were likewise just entering new markets in competition with entrenched providers. The Commission found that opt-out was the appropriate approach to giving customers the ability to control the flow of information on their local service to the unseparated CPE and enhanced services entities, while giving the carriers the ability to engage in joint marketing – the very benefits accorded under the Act. As pointed out above, during the period when this opt-out policy was in effect, the CPE and enhanced services market flourished, with no indication that the Bell companies were able to exercise market dominance. There is no reason to expect any different result in the long distance market.

V. The Commission Should Not Revisit the Total Service Approach and Should Adopt Its Interim Opt-Out Rules.

The Commission asks whether it should revisit the total service approach, under which a customer has implicitly approved sharing of information among all parts of an enterprise in which that customer has subscribed to an existing service. *See Clarification Order and Second Further Notice of Proposed Rulemaking*, FCC 01-247, & 21 (rel. Sept. 7, 2001) ("NPRM"). It should not. The Commission's original rationale for adoption of the total service approach, that "the CPNI limitations should relate to the nature of the service provided and not the nature of the entity providing the service," has not changed. CPNI Order at & 51. In adopting the initial CPNI rules, the Commission found that Congress "understood the scope of section 222(c)(1) to be limited according to the total service *subscribed to* by a customer." *Id*. at & 38 (emphasis in the original). It also found the total service approach to be consistent with offering customers one-stop shopping, which it found was good policy and consistent with customer expectations. *Id*. at & 43. These findings are as applicable under opt-out as under opt-in. When a customer subscribes to multiple services from a company, such as local and wireless or long distance, that

customer naturally expects to be able to deal with that company as a single entity. The customer doesn't care that certain services are offered through separate affiliates. Instead, the customer wants to be able to deal with a single point of contact within that company for all existing services and expects that contact to have full access to all customer records needed for that purpose. Allowing that information flow is fully consistent with customers' privacy expectations, and it would be more invasive of the customer's privacy to have to review an opt-out notice. There is no more reason for requiring such a notice in an opt-out environment than there was under the prior opt-in regime. The Commission should, therefore, retain the total service approach it initially adopted.

In the Order here, the Commission adopted or clarified rules to remain effective pending completion of this rulemaking. Specifically, it allowed carriers to provide customers with notification of their opt-out rights either in writing or orally, consistent with existing section 64.2007(f) of the Commission's rules. NPRM at & 9. Carriers must provide a convenient means for customers to opt-out, such as a detachable reply card, toll-free telephone number, or electronic mail address. *Id*. Further, the carriers must give customers thirty days after receipt of the notice to respond to the notification before they may use the CPNI to sell or market products and services outside of the customers' total service. *Id*. at & 11.

These are reasonable requirements, and the Commission should adopt them on a going-forward basis. Given the variety of means that carriers use to deal with customers, it would be inconvenient to the public if the method of giving notice were restricted to one medium. So long as the notice is sufficiently complete to enable the customer to make an informed choice, as provided in the current rule, the public is protected. And a thirty-day period is sufficient for a response. In practice, customers who choose to opt out will probably do so almost immediately,

when the notice is fresh in their minds, but allowing thirty days is not unreasonable. Of course, if a customer decides later to restrict use of CPNI, the carrier will need to curtail its use immediately outside of that customer's total service.

VI. Conclusion

Accordingly, the Commission should adopt opt-out and affirm its earlier findings on the interplay of section 222 and 272.

Respectfully submitted,

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Attachment A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.